

Letter of Findings: 04-20110615
Sales and Use Tax
For the Years 2008, 2009, and 2010

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ISSUE

I. Sales and Use Tax – Imposition.

Authority: IC § 6-2.5-1-5; IC § 6-2.5-2-1; IC § 6-2.5-4-1; IC § 6-2.5-5-1; IC § 6-8.1-5-1; [45 IAC 2.2-4-1](#); IC § 6-2.5-13-1; Indiana Dep't. of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Hall v. Indiana Dep't of State Revenue, 720 N.E.2d 1287 (Ind. Tax Ct. 1999); Hurst v. Indiana Dep't of State Revenue, 721 N.E.2d 370 (Ind. Tax Ct. 1999); Streamlined Sales and Use Tax Agreement (adopted 2002 and amended through December 19, 2011); Streamlined Sales and Use Tax Agreement, Interpretative Opinion 2008-1 (adopted April 2, 2008).

Taxpayer, a florist, protests the assessment of sales tax on fees it charges its customers for relaying the customers' orders for flowers to a second florist to be delivered remotely.

STATEMENT OF FACTS

Taxpayer is an Indiana company, which operates several retail flower shops located in Indiana. Taxpayer conducts retail transactions through a florist telegraphic delivery ("FTD") association (namely, a clearinghouse) and offers delivery within and outside of Indiana. On some occasions, customers, who place the orders at Taxpayer's shop, wish to have the flowers delivered to a remote area, such as a different state or country. Taxpayer is the florist ("Accepting Florist") who accepts orders from customers and forwards the orders to a second florist ("Delivering Florist") who delivers the flowers according to the orders and instructions.

The FTD association operates on a member-only arrangement. According to the FTD association's rules, "[a]ll items sent through the [FTD association] network are 100 [percent] guaranteed" and both the Accepting and Delivering Florists must honor the promise of 100 [percent] customer satisfaction. All Accepting Florists must collect payments, including price of the order and delivery charges, and transmit the full amount to the Delivering Florist. All Accepting Florists must collect applicable state and local taxes at the time when the orders were accepted. The Accepting Florists may charge the customers additional fees to cover the costs of transmitting the orders. Within a certain number of days, the Accepting Florists will receive a 20-percent commission on orders reported, which exceed a minimum price set by the FTD association.

Taxpayer accepts orders from Indiana customers and forwards the orders to various Delivering Florists who then prepare and deliver the flowers to the recipients. Taxpayer charges and the customers pay for the price of the flowers, a delivery fee, and a relay or service fee. Taxpayer collects sales tax on all charges, except the "relay or service" charges ("Charges at Issue").

The Indiana Department of Revenue ("Department") conducted a sales/use tax audit for tax years 2008, 2009, and 2010 (the "Years at Issue"). Pursuant to the audit, the Department determined that Taxpayer failed to collect and remit sales tax on the Charges at Issue. The Department's audit also assessed use tax on the grounds that Taxpayer did not pay sales tax or self-assess and remit the use tax on certain purchases of tangible personal property, which Taxpayer used for its business.

Taxpayer only disagreed with and timely protested the assessments of sales tax on the Charges at Issue. A hearing was held. This Letter of Findings ensues. Additional facts will be provided as necessary.

I. Sales and Use Tax – Imposition.

DISCUSSION

The Department's audit determined that the Charges at Issue are fees which Taxpayer charges its customers for services performed in respect to the flowers prior to the transfer of the flowers. Referring to [45 IAC 2.2-4-1](#), the Department's audit concluded that the Charges at Issue constitute a part of the consideration for the sale of tangible personal property – namely the flowers – and, therefore, are subject to sales tax.

Taxpayer, to the contrary, claimed that the Charges at Issue are fees for performing services, namely, relaying or forwarding the customer's orders to the Delivering Florists in the areas where the recipients are located. Taxpayer asserted that, as services, the Charges at Issue, which are separately stated in its invoices, are not subject to Indiana sales tax.

As a threshold issue, all tax assessments are prima facie evidence that the Department's assessment of tax is presumed correct. "The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." IC § 6-8.1-5-1(c); Indiana Dep't. of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463, 466 (Ind. 2012).

Indiana imposes an excise tax called "the state gross retail tax" (or "sales tax") on retail transactions made in

Indiana. IC § 6-2.5-2-1(a). A person who acquires property in a retail transaction (a "retail purchaser") is liable for the sales tax on the transaction. IC § 6-2.5-2-1(b).

Indiana has been a full member participant of the Streamlined Sales Tax project and complies with the Streamlined Sales and Use Tax Agreement (adopted 2002 and amended through December 19, 2011) (the "Agreement"). The Section 309 to the Agreement, Part B. 4., states, "[f]lorist sales as defined by each member state. Such sales must be sourced according to the requirements of each member state." Id. Additionally, the Interpretative Opinion 2008-1 to the Agreement establishes that the florist who accepts an order is "the seller for sales tax and use tax purposes" and thus certain "provisions of the Agreement applicable to the Library of Definitions" do not apply. Streamlined Sales and Use Tax Agreement, Interpretative Opinion 2008-1, 186-87 (adopted April 2, 2008).

IC § 6-2.5-13-1(h), in pertinent part, further provides:

[A] retail sale of floral products in which a florist or floral business:

(1) takes a floral order from a purchaser; and

(2) transmits the floral order by telegraph, telephone, or other means of communication to another florist or floral business for delivery;

is sourced to the location of the florist or floral business that originally takes the floral order from the purchaser.

IC § 6-2.5-2-1 provides:

(a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.

(b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.

IC § 6-2.5-1-5, in relevant part, provides:

(a) Except as provided in subsection (b), "gross retail income" means the total amount of consideration, including cash, credit, property, and services, for which tangible personal property is sold, leased, or rented, valued in money, whether received in money or otherwise, without any deduction for:

(1) the seller's cost of the property sold;

(2) the cost of materials used, labor or service cost, interest, losses, all costs of transportation to the seller, all taxes imposed on the seller, and any other expense of the seller;

(3) **charges by the seller for any services necessary to complete the sale, other than delivery and installation charges;**

(4) delivery charges; or...

For purposes of subdivision (4), delivery charges are charges by the seller for preparation and delivery of the property to a location designated by the purchaser of property, including but not limited to transportation, shipping, postage, handling, crating, and packing.

(b) "Gross retail income" does not include that part of the gross receipts attributable to:

(1) the value of any tangible personal property received in a like kind exchange in the retail transaction, if the value of the property given in exchange is separately stated on the invoice, bill of sale, or similar document given to the purchaser;

(2) the receipts received in a retail transaction which constitute interest, finance charges, or insurance premiums on either a promissory note or an installment sales contract;

(3) discounts, including cash, terms, or coupons that are not reimbursed by a third party that are allowed by a seller and taken by a purchaser on a sale;

(4) interest, financing, and carrying charges from credit extended on the sale of personal property if the amount is separately stated on the invoice, bill of sale, or similar document given to the purchaser;

(5) any taxes legally imposed directly on the consumer that are separately stated on the invoice, bill of sale, or similar document given to the purchaser;

(6) installation charges that are separately stated on the invoice, bill of sale, or similar document given to the purchaser; or

(7) telecommunications nonrecurring charges.

IC § 6-2.5-4-1, in relevant part, states:

(a) A person is a retail merchant making a retail transaction when he engages in selling at retail.

(b) A person is engaged in selling at retail when, in the ordinary course of his regularly conducted trade or business, he:

(1) acquires tangible personal property for the purpose of resale; and

(2) transfers that property to another person for consideration.

(c) For purposes of determining what constitutes selling at retail, it does not matter whether:

(1) the property is transferred in the same form as when it was acquired;

(2) the property is transferred alone or in conjunction with other property or services; or

(3) the property is transferred conditionally or otherwise.

...

(e) The gross retail income received from selling at retail is only taxable under this article **to the extent that the income represents:**

- (1) **the price of the property transferred**, without the rendition of any service; and
- (2) except as provided in subsection (g), **any bona fide charges** which are made for **preparation, fabrication, alteration, modification, finishing, completion, delivery, or other service performed in respect to the property transferred before its transfer and which are separately stated on the transferor's records. (Emphasis added).**

For purposes of this subsection, a transfer is considered to have occurred after delivery of the property to the purchaser.

[45 IAC 2.2-4-1](#) explains:

- (a) Where **ownership of tangible personal property is transferred for a consideration**, it will be **considered a transaction of a retail merchant constituting selling at retail** unless the seller is not acting as a "retail merchant".
- (b) All elements of consideration are included in gross retail income subject to tax. Elements of consideration include, but are not limited to:
 - (1) The price arrived at between purchaser and seller.
 - (2) **Any additional bona fide charges added to** or included in such price for preparation, fabrication, alteration, modification, finishing, completion, delivery, or **other services performed in respect to** or labor charges for work done with respect to **such property prior to transfer.**
 - (3) **No deduction from gross receipts is permitted for services performed** or work done on behalf of the seller **prior to transfer of such property at retail. (Emphasis added).**

In this instance, Taxpayer, an Indiana florist and also a member of the FTD association, stated that when a customer places an order for the flowers to be delivered to a different state or country, it relays that order to another florist, Delivering Florist, through its FTD association network. Taxpayer explained that that Delivering Florist (also a member to the FTD association), upon receiving the forwarded customer's order from Taxpayer, will then prepare the flowers and deliver them to the designated recipient per the customer's instruction. Taxpayer contended that the Charges at Issue are not fees for services "[] performed in respect to the property transferred before its transfer []" by Taxpayer; but rather that the Charges at Issue are "for the service provided by the florist delivery association for having the order filled by florists located in other jurisdictions"; and that the Charges at Issue are not "a direct cost associated with the actual preparation, fabrication, alteration, modification, finishing, completion, or delivery of the product being sold to the customer." Thus, Taxpayer asserted that it charges its customer the Charges at Issue to "make a phone call to a florist in another area" and that the Charges at Issue were "not a direct fee charged to the customer as part of the sales price for the product/services provided to the Taxpayer's customer." Taxpayer thus maintained that, pursuant to IC § 6-2.5-4-1-(e), the Charges at Issue are not subject to Indiana sales tax.

Taxpayer's reliance is misplaced. Taxpayer, as well as other florists in similar circumstances, are the members of the member-only FTD association, which promises 100 percent customer satisfaction guarantee and which all members within the network share a portion of revenue. Taxpayer may assert that it does not physically own the flowers which were ordered and delivered to the customer's designated recipients. However, possession includes "actual" or "constructive." "Constructive possession occurs when somebody has the intent and capability to maintain dominion and control over the item." *Hall v. Indiana Dep't of State Revenue*, 720 N.E.2d 1287, 1290 (Ind. Tax Ct. 1999); *Hurst v. Indiana Dep't of State Revenue*, 721 N.E.2d 370, 374-75 (Ind. Tax Ct. 1999). In this instance, every florist who is a member within the FTD association network, including Taxpayer, has constructive possession over the flowers ordered and to be delivered. When Taxpayer takes orders from its customers, it knows that a Delivering Florist will honor and fulfill its forwarded orders under the FTD association's rules. Thus, in making the sales, Taxpayer promises and guarantees the customers that the ordered flowers will be delivered to the customer's designated recipients in a different state or country. Taxpayer promises and guarantees its customers to fulfill the orders as the customers expect. These promises and guarantees are fulfilled according to the arrangements through the FTD association. Taxpayer thus has constructive possession of the flowers and is a retail merchant making retail transactions. When the flowers are transferred for consideration, "all elements of consideration are included in gross retail income subject to tax" including, but not limited to, "[a]ny additional bona fide charges added to or included in such price for preparation..., delivery, or other services performed in respect to or labor charges for work done with respect to such property prior to transfer." Therefore, any charges by Taxpayer "for any services necessary to complete the sale" must be included in the Indiana "gross retail income" and are subject to Indiana sales tax pursuant to IC § 6-2.5-1-5(a) and IC § 6-2.5-4-1(e).

In short, the Charges at Issue are subject to sales tax.

FINDING

Taxpayer's protest is respectfully denied.

Posted: 07/25/2012 by Legislative Services Agency

